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# In the Supreme Court of the United States

OCTOBER TERM, 1962

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No. —

UNITED STATES OF AMERICA, APPELLANT

*v.*

JERRY BRAVERMAN

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*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA*

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## JURISDICTIONAL STATEMENT

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### OPINION BELOW

The order dismissing the indictment (Appendix, *infra*, p. 12) is not reported.

### JURISDICTION

On June 26, 1962, the district court dismissed the indictment charging that appellee, an employee of a shipper, solicited a rebate from a common carrier in respect to the transportation of the shipper's property in interstate commerce, for failure to charge an offense under Section 1(1) of the Elkins Act, *infra*, p. 2, in that the indictment did not charge that some advantage would have accrued to the shipper if the solicited rebate had been granted. The jurisdiction of this Court to review on direct appeal a judgment

dismissing an indictment based on a construction of the statute upon which the indictment is founded is conferred by 18 U.S.C. 3731.

## STATUTE INVOLVED

Section 1(1) of the Elkins Act (32 Stat. 847, 34 Stat. 587, 49 U.S.C. 41(1)) provides in pertinent part:

> * * * it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is rerequired by said chapter, or whereby any other advantage is given or discrimination is practiced. * * *

## QUESTION PRESENTED

Whether an indictment charging that an employee of an interstate shipper solicited a rebate from a common carrier in respect to the transportation in interstate commerce of the shipper's property states an offense under the Elkins Act even though it does not allege that some advantage would have accrued in favor of the shipper had the rebate been granted.

## STATEMENT

On June 6, 1962, a three-count indictment was returned in the United States District Court for the Southern District of California, charging that Jerry Braverman, an employee of Andrew Jergens Com-

pany, violated Section 1(1) of the Elkins Act, *supra*, p. 2, by soliciting rebates from a common carrier in respect to the transportation of his employer's property in interstate commerce. The pertinent facts, as set forth in the indictment, are as follows:

The Andrew Jergens Company is a corporation engaged in the manufacture, distribution and sale of cosmetics and toiletries and maintains a distribution office and warehouse in Burbank, California from which it ships its products in interstate commerce. During the period from January 23, 1962, until March 6, 1962, the Jergens Company utilized the services of Superior Fast Freight, a freight forwarder doing business in Los Angeles, California, for various interstate shipments of its merchandise.[1] Superior Fast Freight had published and filed tariffs of its rates and charges with the Interstate Commerce Commission as required by law.

Count one of the indictment charged that on or about January 20, 1962, the appellee (Jerry Braverman), who was employed by the Jergens Company as the transportation manager of its Burbank branch, "did knowingly solicit" from Eugene Allen, traffic solicitor of Superior Fast Freight, a "concession and rebate" of two percent of the total freight bill revenues that Superior Fast Freight would receive in respect to any property tendered to it by the Jergens Company at Burbank and Los Angeles, California, for transportation in interstate commerce. Count two charged that on or about February 12, 1962, appellee

[1] The indictment enumerated representative shipments by Superior Fast Freight during this period.

knowingly solicited a rebate of $200 for shipments by the Jergens Company, and count three charged appellee with a similar solicitation on February 21, 1962 of $150 for every $3,000 in freight revenues received by Superior Fast Freight from the Jergens Company. Each count charged further that, if the solicited rebate had been granted, the property of the Andrew Jergens Company would have been transported at a lesser rate than that set forth in the applicable tariffs of Superior Fast Freight published and filed with the Interstate Commerce Commission.[2]

On June 26, 1962, the district court issued an order dismissing the indictment on the ground that it failed to charge a violation of the Elkins Act in that it did not allege that the Andrew Jergens Company (the shipper) would have gained an advantage over its competitors had the requested rebate been granted.

**THE QUESTION IS SUBSTANTIAL**

In ruling that the indictment did not charge an offense under Section 1(1) of the Elkins Act, *supra,* p. 2 because it failed to allege that, had the rebate solicited by the appellee been granted, some advantage would have accrued to the shipper (appellee's employer) as against other shippers, the district court improperly limited the scope and purpose of that legislation. By its restrictive interpretation, it significantly narrowed the reach of the statute as envisioned by Congress and imposed a burden of proof on the

[2] The Interstate Commerce Act, Part IV, as amended, 56 Stat. 284, 49 U.S.C. 1001 *et seq.*, deals with freight forwarders and 49 U.S.C. 1021(g) makes applicable to freight forwarding services the provisions of Section 1(1) of the Elkins Act.

government which the Act was designed to remove. Congress, in adopting the Elkins Act, was not seeking simply to eliminate the blatant and evident inequality and discrimination where the evidence was plain that a particular shipper had obtained a preference over his competitors as a result of a concession in a carrier's posted rates. Congress was also concerned with more sophisticated forms of discrimination. To root out all inequality it decreed that *any* diminution in the published tariffs constituted an inherently discriminatory practice, regardless of the nature of the scheme whereby the reduction was achieved and no matter the person or persons benefitted thereby. It was, in short, the congressional judgment that, unless the integrity of tariffs filed with the Interstate Commerce Commission was maintained, discrimination and inequality would be the inevitable result. The district court departed from this legislative judgment.

1. The language of the statute, its legislative history and the relevent judicial decisions support the government's interpretation of the Elkins Act and refute the reasoning of the district court.

*a.* The language of the statute makes it a criminal offense, *inter alia,* for any person to solicit a rebate "in respect to the transportation of any property in interstate or foreign commerce by any common carrier * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier * * * or whereby any other advantage is given or discrimination is practiced * * *". In express terms, therefore, the statute covers the acts charged

as criminal in this case: Appellee solicited a rebate relating to the transportation of property in interstate commerce by a common carrier whereby such property would be transported at a rate less than that provided in the published tariffs. There is not, as the district court held, an additional requirement that the granting of the rebate accrue to the advantage of a particular shipper. On the contrary, by outlawing any solicitation of a rebate which would result in a tariff reduction and then separately condemning "any other advantage * * * or discrimination * * *", Congress indicated that solicitation of a reduction from the published tariffs was, *per se*, a violation. Cf. *United States* v. *Michigan Portland Cement Company*, 270 U.S. 521, 524. Moreover, this Court has consistently recognized that the language of the Elkins Act is not to be grudgingly construed but is to be interpreted consistently with the broad purpose of the legislation to wipe out all forms of inequality in the provision of transportation. See *e.g.*, *Union Pacific R. Co.* v. *United States*, 313 U.S. 450; *Armour Packing Co.* v. *United States*, 209 U.S. 56; *New York, New Haven and Hartford Railroad Co.* v. *Interstate Commerce Commission*, 200 U.S. 361. It is wholly inconsistent with this approach to hold that, regardless of the statute's sweeping language, the rebate prohibition shall be deemed to cover only the case where a resultant advantage to a particular shipper is shown. Cf. *Interstate Commerce Commission* v. *North Pier Terminal Co.*, 164 F. 2d 640, 643 (C.A. 7), certiorari denied, 334 U.S. 815.

*b.* The history of the Elkins Act is well known. This statute was adopted in order to strengthen the original Interstate Commerce Act of 1887 (24 Stat. 379) by plugging loopholes which experience in the enforcement of the earlier legislation had revealed. The Interstate Commerce Commission reported to Congress shortly before the Act's adoption (Annual Report, I.C.C., January 17, 1902, p. 8):

> The [Interstate Commerce] act requires carriers to publish interstate rates and adhere to such published tariffs. But the tenth section, as construed by the courts, does not punish, otherwise than by a possibly nominal fine, a departure from the published tariff, unless there is actual discrimination between shippers. To convict for unjust discrimination it is necessary to show not merely that the railway company paid a rebate to a particular shipper, but it must also be shown that it did not pay the same rebate to some other shipper with respect to the same kind of traffic moving at the same time under similar conditions. As a practical matter this is almost always impossible. For this reason prosecutions otherwise sustainable can rarely be successful; and this is particularly the case where there is an extensive demoralization of rates, and consequently the greatest need for the application of criminal remedies. *Departure from the published rate is the thing which can be shown and the thing which should be visited with fitting punishment.* [Emphasis added.]

Congress' purpose to translate the Commission's recommendations into remedial legislation is shown by the report of the House Committee on Interstate

and Foreign Commerce on Senate Bill No. 7053, which, as amended, became the Elkins Act (See H. Rep. No. 3765, 57th Cong., 2d sess.). The particular evasions brought to the attention of Congress were different in detail, but not in essence, from the problem of this case. Congress found that there was such a general departure from rates that it was impossible to show that one shipper was being preferred to another, i.e., that one shipper had an advantage over others. It decided that the only completely satisfactory method of weeding out the various abuses was to make all departures from the published rate a crime. It recognized "that there is not only a relation, but an indissoluble unity between the provision for the establishment of * * * rates * * * and the prohibitions against preferences and discrimination," *Texas and Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 440.[3] In short, Congress recog-

[3] The Committee Report stated in pertinent part (p. 5): "The existing law prohibits rebates and discriminations, but does not prevent the cutting of published rates unless discrimination is shown. In most cases it is practically impossible to show the discrimination. In the investigations made by the Interstate Commerce Commission respecting rates on dressed beef and packing-house products from Kansas City and Chicago it was finally discovered that for years the railroads had constantly and habitually disregarded their published tariffs and had carried such products at rates below the published tariff to an amount so great that the difference between the published rate and the actual rate amounted to millions of dollars a year: and it was the unanimous testimony that all shippers who were interested in those rates got practically the same rate. There was, therefore, no discrimination between the shippers, and no shipper was liable to prosecution for obtaining a rate which discriminated in his favor. But the effect of such secret cutting of rates is to place in the hands of a small aggregation of

nized that departure from rates, directly or indirectly, makes for discrimination, and it therefore undertook to eliminate the necessity of showing an advantage to a particular shipper as a result of such a departure. The ruling of the district court would reinstitute a requirement which Congress deliberately abandoned many decades ago.

*c.* The pertinent cases similarly hold that no advantage need be shown to a particular shipper to permit prosecution under the Act. *Dye* v. *United States*, 262 Fed. 6, 9 (C.A. 4); *Interstate Commerce Commission* v. *North Pier Terminal Co.*, 164 F. 2d 640, 643 (C.A. 7), certiorari denied, 334 U.S. 815; *United States* v. *Delaware L. & W. R. Co.*, 152 Fed. 269, 273 (C.C.S.D.N.Y.); *United States* v. *Miller*, 18 F. Supp. 389 (D. Neb.). Thus in the *Delaware* case, *supra*, decided some four years after the adoption of the Elkins Act, the carrier demurred to an indictment charging it with the illegal payment of rebates on the ground that

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shippers the absolute control of the business, because no person can afford to enter into competition who does not receive the cut of rates, and no person is in a position to demand or receive such cut until after he shall have become established in business and have an extensive business behind him.

"The bill which we recommend provides a penalty, * * * against any person or corporation which shall give or receive any rebate, concession, or discrimination in respect to the transportation of property whereby such property shall be transported at a less rate than that named in the tariffs published and filed in accordance with the interstate-commerce law. This provision makes it a penalty against the railroad company to give to anyone a rate less than the published rate while that rate remains in force, and it also makes it a penalty against any person receiving the benefit of a rate less than the published rates."

the payment had not gone to the shipper but to the shipper's employee, who had arranged to bring in his employer's business. In overruling the demurrer, the district court stated (152 Fed. at 273), "the mere fact that a rebate is not paid to the shipper, but is paid to somebody else, is quite immaterial under the Elkins Act. If it is in fact a rebate, concession, or discrimination whereby the property is transported at a less rate than that named in the tariff, the unlawful act is committed." See, also, *Spencer Kellogg & Sons* v. *United States,* 20 F. 2d 459 (C.A. 2), certiorari denied, 275 U.S. 566; *Vandalia R. Co.* v. *United States,* 226 Fed. 713 (C.A. 7); *Interstate Commerce Commission* v. *Reichmann,* 145 Fed. 235 (C.C.N.D. Ill.); *United States* v. *Milwaukee Refrigerator Transit Co.,* 145 Fed. 1007 (E.D. Wis.)

The courts have also recognized that no collusion is necessary between shipper and carrier to punish either one for a statutory violation (*United States* v. *Koenig Coal Co.,* 270 U.S. 512, 519–520); that any person, regardless of whether he is a shipper or carrier, may be guilty of a discriminatory practice under the statute. (*Union Pacific R. Co.* v. *United States,* 313 U.S. 450; *Spencer Kellogg & Sons* v. *United States,* 20 F. 2d 459 (C.A. 2), certiorari denied, 275 U.S. 566); and that the statutory prohibition applies to any device or scheme by which discrimination and inequality are attempted or achieved (*Armour Packing Co.* v. *United States,* 209 U.S. 56, 72.) For, as this Court has stated, "the purpose of Congress in the Elkins law was to cut up by the roots every form

of discrimination, favoritism and inequality," *United States* v. *Koenig Coal Co., supra,* 270 U.S. at 519.

2. Unless conduct like appellee's is held subject to effective criminal sanction, a common carrier would either have to pay the "bribe" demanded by a shipper's agent or face the danger of losing the shipper's business. If the carrier did pay the rebate, other interested carriers would be prejudiced by the secret agreement.[4] And if these competing carriers learned of the "shakedown," a kind of undisclosed competition could result, with carriers vying with each other in offering bribes to shipping agents in order to procure the business of their principals. The upshot could well be the very "rate wars, detrimental to the efficiency of the carriers" which it was a principal purpose of the Act to prevent. See *Union Pacific R. Co.* v. *United States,* 313 U.S. 450, 463.

## CONCLUSION

It is respectfully submitted that the question presented is a substantial one and that this Court should note jurisdiction of the appeal.

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SEPTEMBER 1962.

[4] "The purpose of the statute is to protect the carrier, as well as the shipper, * * *". *United States* v. *Miller*, 18 F. Supp. 389, 391 (D. Neb.).

# APPENDIX

United States District Court
Southern District of California
Central Division

No. 30912, Criminal
MINUTES OF THE COURT

Date: June 26, 1962.
At: Los Angeles, Calif.

U.S.A.
*vs.*
JERRY BRAVERMAN

Present: Hon. Wm. C. Mathes, district judge; deputy clerk, W. E. Payne; reporter, Virginia Wright; U.S. attorney, by Assistant U.S. Attorney Charles M. Gary Cooper; defendant on O/R; counsel, Charles L. Lippitt (retained).

Proceedings: For jury trial. Indictment in three counts.

Court convenes at 10 a.m. All present as shown.

All members of counsel, defendant, and the reporter approach the bench out of hearing of the prospective jurors. A general conference is had among counsel and court. Legal citations are presented by both sides.

Counsel for Government having represented to the court that the solicitations alleged in the indictment were for the personal benefit of defendant, and not for the benefit of the shipper by whom he was employed, the court construes the indictment as not alleging a

public offense under the Federal statute; and, upon motion by defendant, orders the indictment dismissed without prejudice to the prosecution of the defendant for an offense within the provisions of title 49 U.S.C., sec. 41(1), if the plaintiff be so advised.

[SEAL]

JOHN A. CHILDRESS,
*Clerk,*

By W. E. PAYNE,
*Deputy Clerk.*

WM-6/26/62.

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